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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,

No. CR-07-0645 MMC

12 Plaintiff,

**ORDER AFFORDING DEFENDANT
OPPORTUNITY TO AMEND OR
WITHDRAW MOTION**

13 v.

14 MICHAEL JOSEPH SILVA,

15 Defendant.
16 _____/

17 Before the Court is defendant Michael Joseph Silva's ("Silva") "Motion for Guilty Plea
18 Withdrawal After Sentencing (Fair and Just Reason)," filed December 29, 2008, by which
19 Silva challenges the sentence imposed upon him by this Court. The proper motion to
20 challenge a sentence in the sentencing court is a motion filed under 28 U.S.C. § 2255. See
21 28 U.S.C. § 2255. A court, however, may recharacterize a pro se litigant's motion "in order
22 to avoid unnecessary dismissal, to avoid inappropriately stringent application of formal
23 labeling requirements, or to create a better correspondence between the substance of a
24 pro se motion's claim and its underlying legal basis." See Castro v. United States, 540 U.S.
25 375, 381-82 (2003) (internal citations omitted). Here, the Court intends to recharacterize
26 Silva's motion as a motion filed under § 2255.

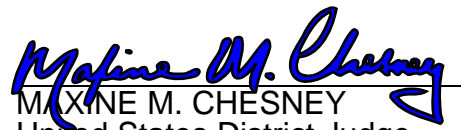
27 Such recharacterization, however, would "mean[] that any subsequent § 2255
28 motion will be subject to the restrictions on second or successive motions" filed under

1 § 2255. See Castro, 540 U.S. at 383 (internal quotation omitted); see also 28 U.S.C. §
2 2255(h) (providing “second or successive” § 2255 motions must be certified by appellate
3 panel as containing newly discovered evidence or new rule of constitutional law).

4 Under such circumstances, the Court will afford Silva an opportunity to amend his
5 motion “so that it contains all the § 2255 claims he believes he has,” or, in the alternative,
6 he may withdraw the motion. See Castro, 540 U.S. at 382. Any amended motion or notice
7 of withdrawal shall be filed no later than February 27, 2009.

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9 **IT IS SO ORDERED.**

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11 Dated: January 23, 2009


MAXINE M. CHESNEY
United States District Judge